Supreme Court, U. S.
FILED
FEB 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1128

KATHRYN ANN FAY,

Petitioner,

v.

RALPH W. RICHTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

KATHRYN ANN FAY,

Petitioner,

v.

RALPH W. RICHTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Hamilton County Court of Appeals for the First Appellate District entered on July 26, 1976, which affirmed the Opinion and Order of the Hamilton County Court of Common Pleas entered July 28, 1975.

OPINIONS BELOW

The decision of the Court of Appeals and the opinion of the trial court are unreported and are reproduced in the appendix at pages 3a & 1a respectively. The Ohio Supreme Court refused to exercise its jurisdiction and denied rehearing appendix 10a-13a.

JURISDICTION

The decision of the Court of Appeals was entered on July 26, 1976 from which a timely appeal was taken to the Ohio Supreme Court. The Ohio Supreme Court sua sponte dismissed the appeal, overruled the motion to certify the record from the Court of Appeals, thus declining to exercise its jurisdiction over the case.

Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Is it a denial of equal protection by Judicial fiat in the application of the law to distinguish a surgical procedure which negligently entraps a nerve from that of leaving a foreign object in the body?

2. Is an action for medical malpractice based upon a prior surgical procedure which negligently entraps a nerve and which said nerve entrapment did not manifest itself until sometime thereafter, timely filed under § 2305.11 O.R.C., if filed within one year from the time the negligent act was discovered, or with reasonable diligence should have been discovered?

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution — Fourteenth Amendment —

> "No State shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws."

§ 2305.11 — Ohio Revised Code (O.R.C.)

> "An action . . . for malpractice against a physician or hospital, . . . shall be brought within one year after the cause of action thereof accrued, . . ."

STATEMENT OF THE CASE

The petition for certiorari is prosecuted from the judgment of the trial court which was affirmed by the Court of Appeals, First Appellate District. The Ohio Supreme Court denied jurisdiction and rehearing.

This is a medical malpractice case in which there are as Judge Black stated in his opinion "no basic dispute about the facts." The physician-client relationship began on April 7, 1970, there was a surgical procedure on July 16, 1970 for bunions and the physician-patient relationship terminated on January 12, 1971. Plaintiff, a female in her early 20's showed initial improvement in her condition following the surgery and which said improvement disguised the latent injury which did *not* manifest itself until the passage of time. The Petitioner later began to experience pain and started to develop a visible deformity in her feet. The petitioner then sought other medical opinions as to her worsening condition and on April 15, 1974 the Plaintiff was given the indication by another orthopedic surgeon that the surgery performed by the Defendant was performed in a negligent manner, that the treatment of Plaintiff by the Defendant was improper and sub-standard and that this negligent treatment and surgery was the cause of her worsening condition. The Plaintiff has been forced to undergo two major corrective surgeries in the Summer and Fall of 1974 requiring substantial periods of hospitalization and recuperation. On April 14, 1975, a date within one year of the time that the Plaintiff was informed of De-

fendant's negligent act by a competent medical expert, the Plaintiff commenced this action by the filing of a Complaint in the Court of Common Pleas of Hamilton County, Ohio.

Respondent moved to dismiss the Complaint, based on the Statute of Limitations, citing *Wyler* v. *Tripi,* 25 Ohio St. 2d 164 (1971), which held that under § 2305.11 R.C., "a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship finally terminates." Petitioner, in opposition to the motion, asserted that pursuant to *Melnyk* v. *The Cleveland Clinic,* 32 Ohio St. 2d 198 (1972), that a cause of action for medical malpractice occurs one year year from the date of termination of the doctor-patient relationship and/or one year from the date the patient discovered or should have discovered with reasonable diligence the negligent act whichever of these events occurs last. The trial court granted the Motion To Dismiss based on the one-year statute of limitations, holding that more than one year had passed since the surgical procedure complained of, and therefore, this case did not fall within the judicially interpreted exception of delayed discovery.

Petitioner raised the equal protection question in the Assignments of Error on appeal to the Hamilton County Court of Appeals. Assignment of Error Number 5 stated that: "It is reversible error and a denial of equal protection and due process to hold that the 'discovery' rule in medical negligence cases brought under § 2305.11 O.R.C. applies only to those instances where a foreign object is left in the patient following surgery." The Court of Appeals affirmed the decision of the trial court, holding that the *Melnyk* decision was expressly limited to foreign objects left in the body and that this holding does not amount to a denial of equal protection of the laws (Appendix B pages 5a-6a). Petitioner appealed to the Supreme Court of Ohio, stating

in Proposition of Law Number 1 that: "To distinguish a surgical procedure which negligently entraps a nerve from that of leaving a foreign object in the body is a denial of equal protection in the application of the law." The Ohio Supreme Court declined to accept jurisdiction, stating that no substantial constitutional question existed. Petitioner applied for a rehearing, reiterating that substantial equal protection questions were involved. The Supreme Court of Ohio again denied jurisdiction. Petitioner properly raised constitutional questions so as to give this Court jurisdiction to review the judgment on writ of certiorari.

REASONS FOR GRANTING THE WRIT

The judicial application of the Ohio's Limitation of Action section constitutes a denial of equal protection of the law. The issue is whether distinguishing a surgical procedure which negligently leaves a foreign object trapped within the body from that of a surgical procedure which negligently entraps a nerve and places it in a negligent position foreign to the body is a denial of equal protection in the application of the law in violation of the Fourteenth Amendment. It is the Petitioner's contention that to make such a distinction is a denial of equal protection in the application of the limitation of action statute as stated in § 2305.11 O.R.C. The issue before the bar is no different than that issue resolved by the Ohio Supreme Court in *Primes* v. *Tyler,* 43 Ohio St. 2d 195, 331 N.E. 2d 723 (1975) [Guest Statute case], which held that the granting of a special privilege and immunity to one particular class of individuals is a violation of those rights to equal protection as protected under the Fourteenth Amendment to the United States Constitution. *Primes* v. *Tyler, supra,* at 726-727; *Jimenez* v. *Weinberg,* 417 U.S. 628 (1974);

Shapiro v. *Thompson,* 394 U.S. 618 (1969). This court has the power to interpret a statute so as to include whatever essential requirements are necessary to make its application constitutional. *Ayers* v. *Morgan,* 154 A. 2d 788, at 795 (1959).

"In short, the prevention of spurious claims is not 'suitably furthered' " (*Primes* v. *Tyler, supra,* at 727 (1975)) by the interpretation that the Limitation of Action statute is tolled in negligent surgical cases only when there is a foreign object left in the body and not when there is a nerve trapped negligently by the surgeon and left in a closed incision in a manner foreign to the body; nor is the prevention of spurious claims furthered by the differential treatment afforded to the patients and to the physicians.

> "However, [i]n all equal protection cases * * * the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of Chicago* v. *Mosley* (1972), 408 U.S. 92, 95, 92 S. Ct. 2286, 2290, 33 L.Ed. 2d 212.
>
> Recognizing that the arbitrary imposition of disabilities " '* * * is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing' " (*Jimenez* v. *Weinberg* (1974), 417 U.S. 628, 632, 94 S. Ct. that " '* * * The Equal Protection Clause does enable us to strike down discriminatory law * * * where . . . the classification is justified by no legitimate state interest, compelling or otherwise.' (*Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, at 175-176, 92 S. Ct. 1400, 31 L.Ed. 2d 768." Ibid." (as quoted in *Primes* v. *Tyler, supra* at 726.)

There is no argument that the *Melnyk* decision, *supra,* deals with a foreign object left in a surgical incision. One only has to look at the words of Judge Herbert in the

Court's opinion to realize that the "discovery rule" was not to be limited to only those cases where a foreign object was left in the patient but was to be extended to all cases where a negligent surgical procedure was involved. Judge Herbert stated:

> ". . . Whichever choice other states have made, it is our opinion that pressures associated with modern surgeon-patient relationships supply an even sounder and broader basis for announcing an exception to the general rule in cases such as the one at bar. Hence, we base our reasoning not only upon an absence of the vexatious inequities usually associated with the entertaining of 'stale' medical claims, but also upon matters of sound public policy, springing from the absolute and irrevocable dependence of patient upon surgeon during surgery and from the huge increase in societal or public medicine with its lamentable but concomitant lessening of the fiercely private surgeon-patient relationship of years past. The facts at bar bear witness to the hypostasis of our determination in that regard." *Melnyk, supra,* 202-203.

"Patients should not be encouraged to go from physician to physician in an effort to ascertain whether the diagnosis made and the treatment received are proper. Silence on the part of the physician (s) for the statutory period should not destroy the rights of the patient." *Spath* v. *Morrow,* 174 Neb. 38, 115 N.W. 2d 581, 584 (1962) as quoted in *Shinabarger* v. *Jatoi,* 387 F. Supp. 707, 710 (1974).

The limited interpretation given to the *Melnyk* v. *The Cleveland Clinic,* 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972) case by the lower courts in this action condones negligently performed surgical procedures. This limited interpretation denies this Petitioner and other possible Petitioners who in the future are innocent victims of negligently performed surgery their day in court and their day to redress. "[T]o

conclusively deny one subclass" (i.e. those patients who have negligent surgery which is concealed by the closing of the incision; which places a nerve in a position foreign to it, and which in the future is the proximate cause of a deteriorating medical condition, and the necessity for corrective surgery) "benefits presumptively available to the other" (i.e. those surgical patients who have a foreign object left in them from a surgical procedure) "denies the former the equal protection of the laws." *Jimenez* v. *Weinberg, supra,* at 636-637, 94 S. Ct. at page 2507, as quoted in *Primes* v. *Tyler, supra,* at 727.

The Petitioner in this case has *not* slept on her rights; she pursued her case with diligence within the one year from the time in which she, with reasonable diligence, became aware and/or was informed and/or discovered the negligent acts of the Respondent. It is, therefore, the Petitioner's contention that she timely initiated her claim in conformity with the judicial interpretation of § 2305.11 O.R.C. as it was commenced within one year from the time that she "discovered" that she had a cause of action. To hold otherwise and to differentiate the facts in this case from a situation in which a surgeon negligently leaves a foreign object within the body would be a clear and substantial denial of equal protection and due process of law.

CONCLUSION

This petition raises substantial constitutional questions of great public interest and is within the reach of this Court's certiorari jurisdiction. We respectfully urge that the writ for which the Petitioner prays be issued.

Respectfully submitted,

MARLENE PENNY MANES

JAMES R. RIMEDIO

Attorneys for Petitioner

APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-752949

KATHRYN ANN FAY,

Plaintiff,

v.

RALPH W. RICHTER,

Defendant.

OPINION

BLACK, J.:

Plaintiff sues her doctor for medical malpractice, filing a Complaint and then an Amended Complaint. Defendant has filed Motions to Dismiss against both filings.

From the pleadings and the affidavits submitted by the parties, there is no basic dispute about the facts. The physician-client relationship began on April 7, 1970, there was a surgical procedure on July 16, 1970, and the relationship terminated on January 12, 1971. Plaintiff became aware of the claimed results of defendant's negligence on April 15, 1974. On April 14, 1975, plaintiff filed her Complaint.

The commencement of this lawsuit was not within the Ohio statute of limitations. As interpreted by the Supreme Court in *Wyler* v. *Tripi*, 25 Ohio St.2d 164, 54 Ohio Op.

2d 283 (1971), Revised Code §2305.11 requires that actions for "malpractice . . . shall be brought within one year after the cause thereof accrued . . ." and this period begins "at the latest, when the physician-patient relationship finally terminates." In the instant case the lawsuit was begun 4 years, 3 months and 2 days after the professional relationship terminated.

As is clear from the majority opinion in the *Wyler* case, this is true whether, within the time limited by the statute, the act constituting malpractice is known or unknown by the plaintiff.

Plaintiff cites the case of *Melnyk* v. *The Cleveland Clinic*, 32 Ohio St.2d 198, 61 Ohio Op.2d 430 (1972), in which the Supreme Court created an exception to the beginning point for the malpractice statute of limitations. That exception is very limited: it occurs when, and only when a metallic forcep and a non-absorbent sponge are negligently left inside a patient's body during surgery. In that event the statute does not begin to run until the patient discovers or by the exercise of reasonable diligence should have discovered, the negligent act. The basis of that decision appears to be contained in the following sentence, found at page 200 of 32 Ohio St.2d:

> "To carelessly leave a large and obvious metallic forcep and a nonabsorbent sponge in a surgical patient's body is negligence as a matter of law, and the proof thereof is generally unsusceptible to speculation or error."

In the instant case, there is no allegation that any foreign substance was left in plaintiff's body during the surgery performed by defendant, much less a metallic forcept (large or small) or a nonabsorbent sponge.

The Motions to Dismiss are well taken and will be granted.

• • •

APPEARANCES:

Marlene Penny Manes, Esq.
Attorney for Plaintiff

Arthur T. Knabe, Esq.
Attorney for Defendant
July 28, 1975

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75452

KATHRYN ANN FAY,
Plaintiff-Appellant,
v.
RALPH W. RICHTER,
Defendant-Appellee.

Mrs. Marlene Penny Manes and Mr. James R. Rimedio, 914 Main Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. McIntosh, McIntosh & Knabe, Arthur T. Knabe of counsel, 3312 Carew Tower, Cincinnati, Ohio 45202, for Defendant-Appellee.

DECISION

Filed July 26, 1976.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries and original papers from the Court of Common Pleas of Hamilton County, the assignments of error, the briefs and the arguments of counsel.

This cause, an action in medical malpractice, arose with the filing of a complaint by Kathryn Fay, the appellant, on April 14, 1975, alleging, inter alia, negligence on the part of the appellee during the performance of orthopedic surgery by the appellee in July, 1970. The instant appeal derives from the granting of appellee's motion to dismiss on the basis that the applicable statute of limitations had expired prior to the filing of the complaint by the appellant.

Although the appellant set forth seven assignments of error in her brief, upon oral argument appellant's counsel conceded that only two issues are present, the first summarized in appellant's contention that the trial court misconstrued Section 2305.11, Ohio Revised Code. That section provides in pertinent part that:

> "An action . . . for malpractice against a physician or hospital, . . . shall be brought within one year after the cause thereof accrued, . . ."

The appellant had begun treatments with the appellee in April, 1970. These treatments culminated in surgery on July 16, 1970, and were followed by a lengthy period of convalescence and recuperation. The doctor-patient relationship terminated on January 12, 1971.

Thereafter, on April 15, 1974, the appellant was advised by another orthopedic specialist that the treatment provided by the appellee had been negligently rendered, whereupon the appellant had two further orthopedic operations to "correct" the appellee's alleged improper treatment.

The appellant's complaint herein was filed on April 14, 1975, less than one year from the time she "discovered" the alleged malpractice. The trial court concluded, however, that, contrary to appellant's position, the pertinent statute of limitations (RC § 2305.11) began to run upon the termination of the doctor-patient relationship on January 12, 1971, and not, as argued by the appellant, on April 15, 1974, the date of the appellee's consultation with the second specialist.

The Ohio Supreme Court held in *Wyler* v. *Tripi*, 25 Ohio St. 2d 164, that:

> "Under R.C. § 2305.11, a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship finally terminates."

Inasmuch as the instant cause was not filed within the limits of the statute as interpreted in the foregoing decision, we conclude that the trial court did not err in ruling that the instant complaint was not timely filed and in granting the appellee's motion to dismiss.

The appellant next contends that:

> "It is reversible error and a denial of equal protection and due process to hold that the 'discovery' rule in medical negligence cases brought under Section 2305.11, Ohio Revised Code, applies only to those instances where a foreign object is left in the patient following surgery."

This issue was considered and ruled upon by the Ohio Supreme Court in *Melnyk* v. *The Cleveland Clinic*, 32 Ohio St. 2d 196, which held in the first syllabus that:

> "Where a metallic forceps and a non-absorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limita-

tions governing a claim therefor is tolled until the patient discovers or by the exercise of reasonable diligence should have discovered the negligent act."

This holding limited the effect of the court's pronouncement in *Wyler, supra,* but, under the facts of the case at bar, in no way effects the trial court's ruling, since the facts herein do not warrant a finding that the alleged negligence consisted of the leaving of any object inside the appellant's body. Moreover, appellant's argument relative to her claim of deprivation of equal protection was addressed by the Ohio Court of Appeals in *Simmons* v. *Riverside Methodist Hospital,* 44 Ohio App. 2d 146, wherein that court stated at page 150 that:

"The plaintiffs now argue that this court should not interpret *Melnyk* as being restricted to the 'foreign object' but that we in fact should apply such rule to all cases involving a discovery of a negligently performed service or interpretive analysis by physicians or hospitals. The arguments presented by plaintiffs are indeed compelling, and not without a great deal of merit. The plaintiffs reasonably argue that there should be no difference as legally afforded one who has a sponge or forcepts left inside his body from one who, upon later discovery, has been found to have been given an incorrect blood test and analysis.

"It is true that the end resultant may well, in a given instance, be more disastrous in the latter than in the former. However, these considerations and determinations are, we feel, within the policy-making area, and of a legislative nature for determination. At least the great public concern within this field of litigation in the malpractice field renders this subject a broader one than should be determined within this judicial district, and presents issues which, if judicially changed, should be changed by the Supreme Court of the state, not by this court.

"At this point in time, we hold that the supreme judicial body of this state has spoken as to the issues presented. We interpret the case of *Melnyk* v. *Cleveland Clinic, supra,* as holding that the law of Ohio at this moment in time is that the doctrine of 'discovery' shall not be extended beyond the discovery of a 'foreign object' found following a surgical case, to a case of the nature that we have before this court involving an incorrect analysis or interpretation."

We concur with the reasoning of the Court of Appeals in *Simmons, supra,* that the matter is one of policy and without the jurisdiction of this Court. We therefore decline to broaden the scope and holding of *Melnyk, supra,* and conclude accordingly that the appellant was denied neither equal protection nor due process of law in the proceedings below. This assignment of error is not well taken.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

SHANNON, P. J., PALMER and KEEFE, J.J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. C-75452

KATHRYN ANN FAY,

Appellant,

v.

RALPH W. RICHTER,

Appellee.

JUDGMENT ENTRY

Entered July 26, 1976.
Judgment of Affirmance July 28, 1976

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1976 TERM
To wit: October 28, 1976.

No. 76-1058

KATHRYN ANN FAY,

Appellant,

v.

RALPH W. RICHTER,

Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Kathryn Ann Fay.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX E

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

1976 TERM
To wit: October 28, 1976

No. 76-1058

KATHRYN ANN FAY,

Appellant,

v.

RALPH W. RICHTER,

Appellee.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal

having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....
..... Clerk
..... Deputy

APPENDIX F

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1976 TERM
To wit: November 19, 1976

No. 76-1058

KATHRYN ANN FAY,
Appellant,
v.
RALPH W. RICHTER,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

In Witness whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 19th day of November, 1976.
Thomas L. Startzman, Clerk
By ..... Deputy